Unitog Rental Services, Inc. *and* Teamsters Local Union 988. Case 16–CA–14380

August 31, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issues in this backpay proceeding[1] are whether the judge correctly found that (1) the Respondent's offers of reinstatement to discriminatees were invalid; (2) the most junior of the seven discriminatees (Smith) was properly awarded backpay beginning on the date that a seventh position became available at the Respondent's relocated facility; (3) the ''comparable employee'' formula utilized to compute backpay properly included the wages of an individual who was promoted to a supervisory position; and (4) the General Counsel's delay in processing the backpay case is not a basis for reducing the Respondent's backpay obligation.

The Board has considered the decision and the record in light of the exceptions[2] and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Supplemental Order.

We specifically affirm the judge's finding that the Respondent's letters to discriminatees did not constitute valid offers of reinstatement sufficient to toll the Respondent's backpay liability. We disavow any implication that the discriminatees viewed the letters as a communication to all of them about a single job. The letters' reference to an available job to ''be filled in seniority order,'' however, indicated a competitive aspect to eligibility for the vacancy or vacancies at issue. Consequently, a discriminatee would reasonably view the letter as an invitation to bid for a job, rather than as an unconditional offer of reinstatement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Unitog Rental Services, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

[1] On June 9, 1995, Administrative Law Judge Clifford H. Anderson issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] There are no exceptions to the judge's finding that the earnings of J. Sasser were improperly considered in determining backpay for the fourth quarter of 1992 and the first two quarters of 1993.

Robert G. Levy II, Esq., for the General Counsel.
Robert L. Ivey, Esq. (Vinson & Elkins), of Houston, Texas, for Respondent Unitog.
Jerry Doer, Business Representative, of Houston, Texas, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this matter in trial on March 7, 1995, in Houston, Texas. It arose as follows. On July 9, 1991, the National Labor Relations Board (the Board) adopted the Decision and Order of Administrative Law Judge Timothy D. Nelson respecting this proceeding. On March 23, 1994, Respondent entered into a stipulation waiving its rights under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying the Order and providing for a compliance hearing to resolve any disputes concerning the amount of backpay due under the terms of the Order.

A controversy having arisen, the Regional Director for Region 16 of the Board (the Director) issued a compliance specification and notice of hearing dated June 10, 1994. Respondent filed an answer to compliance specification on July 28, 1994. The Director issued an amended compliance specification and notice of hearing on August 29, 1994. Response filed a September 20, 1994 answer to the August 29, 1994 specification. Thereafter the Director issued a second amended compliance specification and notice of hearing on September 26, 1994. Respondent filed an answer thereto dated October 17, 1994. At the hearing the General Counsel and Respondent entered into certain stipulations which resulted in a further amended specification and an amended answer to amended specification.[1]

Based on the record as a whole, including my observation of the witnesses and their demeanor, as well as the posthearing briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. THE BOARD'S ORDER

On July 9, 1991, the Board adopted the Decision and Order of Administrative Law Judge Timothy D. Nelson respecting this case. The Order directed Respondent, in part, to:

> [M]ake whole, with interest, all unit employees at the depot who may have suffered losses in wages or benefits as a consequence of Unitog's failure to apply that agreement at the depot.
>
> . . . .

[1] Respondent in its pretrial answers suggested an alternative method of calculating backpay. I believe that alternative was withdrawn as part of the joint stipulations respecting calculations and that all parties accepted the average earnings of representative employees as an appropriate means of calculating backpay in the instant case. Were this general formula under attack, I would sustain it as a reasonable means of ascertaining backpay where a substantial period of time and numerous employees are involved.

> Offer immediate, full, and unconditional reinstatement to route driving jobs at the depot to the following-named employees, displacing persons currently in those jobs, if need be, and make them whole, with interest, for any losses in wages or benefits they may have suffered as a consequence of its unilateral and discriminatory bypassing of them for such jobs:
>
> | | |
> |---|---|
> | Gilbert Babineaux | Sidney Marlin |
> | James Ballinger | Myron Massie |
> | Freddie Harris | Clarence Smith |
> | Charles Johnson | |

The Decision and Order further provided in footnotes 35 and 36:

> [35] Interest on any amounts owed to drivers actually employed at the depot shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB [1173] (1987).
>
> [36] Make-whole amounts for the seven unlawfully bypassed drivers shall be computed on a quarterly basis from the date they were terminated by Unitog to the date they are properly offered reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, [283 NLRB 1173 (1987)].

II. STATEMENT OF THE ISSUES

As a result of the commendable efforts of counsel, the litigation was greatly simplified by the entrance into alternative stipulations. Thus there is no dispute concerning arithmetic calculations or the amounts which would be due and owing given the resolution of certain threshold issues. The case resolved itself into a consideration of four separate questions.

The first question is the legal effect of Respondent's offers of employment to Babineaux, Smith, Massie, Harris, and Marlin on March 23, 1990, and to Ballinger on September 1991. The second question is the backpay due to Smith. The third question is whether or not the General Counsel properly included Marc Yeaney and J. Sasser as comparable employees in its backpay formulation. Finally, the fourth question is whether or not Respondent's obligations under the specification are reduced as a result of delays in processing the case. These areas are discussed separately below.

III. THE EFFECT OF RESPONDENT'S LETTERS OF MARCH 1990 AND SEPTEMBER 1991

A. *Facts*

On March 23, 1990, Respondent's vice president, Keith A. Wornson, sent letters to discriminatees Babineaux, Harris, Massie, Marlin, and Smith with the following identical text:

> Unitog has an immediate route opening at its facility in Houston. This is an unconditional offer of employment on the open route and will be filled in seniority order. You will be credited with all prior Unitog seniority, including the time since your termination. You are guaranteed pay equal to your average weekly pay during the six months proceeding your termination. This offer is made without prejudice to any pending grievances or unfair labor practices to which you are a party.
>
> If you are interested in this position, please contact Steve Rucas at [phone number deleted] no later than March 30, 1990. If we have not received an acceptance of this offer by April 2, 1990, we must assume you are no longer interested in employment with Unitog.

A letter with essentially identical language save for differing dates was sent to Ballinger on September 11, 1991. Of the individuals who were sent the letter, only Massie responded.[2]

At the June 5, 1990 session of the unfair labor practice trial in this matter held before Administrative Law Judge Timothy D. Nelson, Respondent, through former counsel, offered into evidence the five March 23, 1990 letters quoted above. The General Counsel opposed their receipt into evidence arguing the letters should be offered in a subsequent compliance proceeding should the issue ripen. The General Counsel's objection was sustained. In arguing the issue however, counsel for the General Counsel Levy asserted at page 100 of the transcript: ''I will tell you up front as I have told counsel, this is not a valid offer of reinstatement to begin with. It is limited; it is conditioned.''

B. *Argument of the Parties*

The compliance specification does not toll backpay based on the letters. The General Counsel's position is that the letters were inadequate and are immaterial in calculating the backpay due under the judge's Order. The General Counsel argues on brief at 4:

> It is perfectly obvious that the offers on their face are invalid because they amount to only an invitation to the recipients of the offers to bid on the one and the only one position. See *N.L.R.B. v. Transport Services*, 973 F.2d 562 (7th Cir., 1992) [secondary citation omitted]; enforcing 302 NLRB 22 (1991). The Court noted as follows:
>
> > The NLRB determined that a telegram sent to four people at the same time announcing the availability of one job does not constitute a sufficient offer of reinstatement because it is not specific, unequivocal and unconditional. We uphold the NLRB's legal determination as rational and not inconsistent with the Act. A valid offer of reinstatement should consist of more than an opportunity and invitation to apply. [973 F.2d at 572.]

The General Counsel argues that, in as much as the letters were not unconditional offers of reinstatement, the employees were under no obligation to respond and the letters did not constitute valid offers of reinstatement, did not toll Respondent's backpay obligations, nor fulfill Respondent's obligations under Judge Nelson's Order that the discriminatees be offered unconditional reinstatement.

Counsel for Respondent asserts that the letters were sufficient and valid offers of reinstatement which, when not answered or responded to by the discriminatees, properly ended

[2] There is no dispute and the specification reflects that Massey's backpay period terminated on March 2, 1990, due to physical incapacity.

Respondent's obligations to those individuals under the Order. Addressing the General Counsel's contentions, Respondent argues that the letters were not book letters sent to all the employees as a single mass communication, but rather individual letters which must be evaluated from the perspective of a single individual reading the letter sent to him. Thus, Respondent argues, the fact that the letter describes a single job is of no consequence because the letters were read individually by each receiver. Each receiver was being offered a job, multiple readers were not being offered a chance at a single job.

Second Respondent argues that the General Counsel's argument that the reference to the job being filled ''in seniority order'' makes the offer conditional is not consistent with the entire sentence under challenge. Respondent argues that the entire text: ''This is an unconditional offer of employment on the open route and will be filled in seniority order,'' makes it clear there was no conditionality to the offer. Respondent notes that in *Centac Corp*., 179 NLRB 313 (1969), the Board affirmed an administrative law judge who rejected the General Counsel's claim that an offer of reinstatement was fatally inadequate for want of specificity[3] asserting at 322: ''If the men had doubt, they could have inquired.'' Counsel argues such should be the situation here.

Finally, as further discussed infra, Respondent argues that it should not be punished for the inordinate delay cased by the employees' failure to respond to the letters and the General Counsel's delays in challenging the offers. The General Counsel responds that, as noted in the quoted portion of the transcript of the June 1990 unfair labor practice proceedings, the General Counsel put Respondent on notice early on that the March 23, 1990 letters were—in the General Counsel's mind—of dubious validity as tolling offers of reinstatement. Yet, argues the General Counsel, Respondent, rather than clarifying the letters to the employees who had received them, send a virtually identical letter to discriminatee Ballinger on September 11, 1991, after the Board had affirmed the Judge's Decision and Order. Second, as discussed infra, the General Counsel cites case authority for the proposition that delay by the Agency in concluding the compliance investigation is not a legitimate defense against the claims of discriminatees under unfair labor practice remedial orders.

C. *Analysis and Conclusion*

I agree with Respondent that its letters, quoted above, must be read in their totality to ascertain their fair meaning. Having so considered the letters, however, I do not agree that a reasonable discriminatee reading such a letter would assume that a specific job was being held unconditionally for him or her. Thus, I find that the letters' specific reference to a ''job'' in the singular as well as the assertion that the job would ''be filled in seniority order'' fairly conveyed the impression that one job was available and that it would be awarded to the most senior applicant. Further I do not find the letter reference to ''unconditional offer'' in the context discussed above derogates from this finding.

Given these threshold findings, I further find that the General Counsel's cited case, *Transport Services*, supra, is applicable. I therefore find and conclude that the March 1990 and September 1991 letters described above were not valid offers of reinstatement. I further find there was no obligation on the part of the discriminatees to respond to them and that their failure to respond did not effect their rights under Judge Nelson's Order.[4] Accordingly, and consistent with the stipulation of the parties, the backpay calculation based on the assumption the letters did not reduce Respondent's obligations under the judge's Order is found appropriate.

IV. THE VALIDITY OF ANY REMEDY FOR CLARENCE SMITH

Clarence Smith was the most junior of the discriminatees and would have been the last selected for transfer to the depot. Since only six individuals were initially employed at the depot and there were seven discriminatees, the General Counsel's compliance specification concludes Smith was not initially entitled to gross backpay. The specification starts to accrue gross backpay for Smith as of the date Respondent hired a seventh comparable employee at the depot.

Respondent argues that the General Counsel's implicit admission that Smith was not entitled to initial backpay establishes that Smith would not have been transferred to the facility even were Respondent to have committed no unfair labor practices. On brief Respondent argues at page 8:

> In the natural course of events, [Smith's] employment would have simply been terminated, with no continuing obligation on Unitog's part to re-employ him. Stated another way, but for Unitog's unlawful conduct, Smith would still have been discharged, and Judge Nelson's original order does not direct the Company to create a position just for him. To award him backpay does not make him whole; rather, it provides a windfall to which he would not be entitled under any alternative scenario.

Respondent further argues that the General Counsel should not be allowed to ''drop'' Smith into the backpay rolls at some later time when Respondent added to the staff at the depot. The General Counsel did not address this issue on brief.

I find that Respondent's arguments in this regard: (1) deal with the question of whether or not a violation of the Act occurred with respect to Smith, (2) should have been directed to the judge and the Board in the unfair labor practice stage of the proceeding, and (3) are now precluded by the language of the Order.

It is the role of the judge in a compliance proceeding to insure that the Order is properly applied by reducing its general directions to specific amounts. It is never the role of a judge at the compliance stage to vary the terms of the unfair labor practice proceeding order. The Order in relevant part here directs Respondent in unambiguous language to

[3] The letters at issue asked the individuals to ''report for work as soon as possible.'' The General Counsel argued that the offers improperly failed to assert that the work offered was the same as that previously done or that the individuals would not be obligated to join the Union (179 NLRB at 323).

[4] Respondent's argument that the Board's delay and the employees' failure to respond to the letters should reduce Respondent's obligations under the Order are discussed, infra, under the section of this decision entitled: ''The Effect of Delay on the Obligations of Respondent.''

> Offer immediate, full, and unconditional reinstatement to route driving jobs at the depot to the following-named employees, displacing persons currently in those jobs, if need be, and make them whole, with interest, for any losses in wages or benefits they may have suffered as a consequence of its unilateral and discriminatory bypassing of them for such jobs . . . [list of named employees, including Smith, omitted].

Respondent is suggesting that Smith was not discriminated against, that the Act was not violated as to him, and that he is not entitled to any remedy whatsoever in this proceeding. Clearly, Respondent is seeking to rewrite the Order in Judge Nelson's decision approved by the Board in the absence of exceptions and specifically agreed to by Respondent in its March 23, 1994 stipulation waiving its rights under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying the Order and providing for a compliance hearing to resolve any disputes concerning the amount of backpay due under the terms of the Order. Such reconsideration of the Order is impermissible. Accordingly, I shall not strike the compliance specification as to Smith on the grounds asserted.

V. THE INCLUSION OF MARC YEANEY AND J. SASSER IN THE GENERAL COUNSEL'S BACKPAY CALCULATIONS

A. *The Inclusion of Marc Yeaney*[5]

The compliance specification utilizes the comparable employees method of calculating gross backpay for the discriminatees.[6] Thus, the earnings of comparable employees who worked during the relevant periods were averaged and the average earnings utilized as the amount that each discriminatee would have earned in given calendar quarters had the discriminatees not been discharged by Respondent. There is no doubt that Marc Yeaney, a supervisor, was included in the compliance specification as one of several comparable employees of Respondent for determining gross backpay for the discriminatees. Respondent, who does not challenge the general comparable employee formula, objected to the inclusion of a supervisor in the calculation and proposed the substitution of other individuals who were not supervisors in the second, third, and fourth quarters of 1991 and the first quarter of 1992 in which Marc Yeaney was included as the sales manager.[7]

The General Counsel's rationale for including Supervisor Yeaney was described by the General Counsel's witness, Field Attorney Nadine Littles, and reiterated by the General Counsel on brief. In effect, Yeaney was included in the figures because the General Counsel thought it reasonable that one of the discriminatees would have received the position and, therefore, in order to make the group of discriminatees whole by paying them what they would have received had they not been discriminated against, the earnings of the supervisor were included in the averaging process.

I asked the parties to brief the issue of whether or not a supervisor may, as a matter of law, properly be included in a pool of comparable employees whose earnings are used to determine what the discriminatees' earnings would have been in appropriate periods. Counsel for Respondent asserted his research could find ''no authority for the proposition that this Court should assume that any of the discriminatees would have been promoted from routeman.'' (Br. at 10.) The General Counsel cited the Board decision in *International Trailer Co.*, 150 NLRB 1205, 1210–1211 (1965), in which the judge found, with Board approval, that the issue of whether discriminatees would have been promoted to ''group leader'' for purpose of determining gross backpay earnings was a factual question to be resolved based on specific circumstances. Thus, the test in *International Trailer* for including a given individual who received a promotion in the comparable employee category depends on a factual evaluation of probability: would the promotion have been given to the discriminatee if the Act had not been violated. The ''group leaders'' in that case, however, were not statutory supervisors.[8]

The test set forth in *International Trailer*, supra, is logical and flows naturally from the concept of restoration which underlies the backpay calculations that are part of a ''make whole'' remedy. Make-whole payments are designed to restore the discriminatees to that level of monetary gain they would have achieved had they not been discriminated against. If it is established that a given discriminatee would have acquired a position which paid a superior rate during the backpay period, there is little question that the higher rate should be used in calculating gross backpay. The Board continues to find that backpay claimants, in given situations, would have achieved promotions and includes the higher wage of the promoted comparable employee in backpay calculations.[9] *Bailey Distributors*, 292 NLRB 1106 (1989) (promotion from helper to driver); *Kawasaki Motors Corp.*, 282 NLRB 159 (1986), enfd. 850 F.2d 524 (9th Cir. 1988) (promotion from apprentice to mechanic). Setting aside reinstatement issues not relevant here, a supervisory position is conceptually the same as any other better paying position. If it may be factually established that the discriminatee would have received such a promotion with an increased rate of remuneration, there is no reason to exclude the increased rate in calculating make-whole backpay.

Given all the above, I find that, for purposes of calculating backpay, the status of a given position under Section 2(11) of the Act is immaterial. It is appropriate therefore to consider whether the General Counsel has established that Yeaney's position would have been awarded to one of the discriminatees in the relevant quarters.

The parties disputed whether or not one of the discriminatees would reasonably have been expected to have received the promotion from route salesman to sales manager awarded Marc Yeaney on March 25, 1991. Respondent's general manager, Kelley, testified that discriminatees Babi-

[5] A ''B. Yeaney'' was not in dispute as a comparable employee in various calendar quarters in the specification.

[6] This formula is described in the Board's Compliance Manual par. 10542 entitled ''Formula Three: Use of Average Earnings (or Hours) of a Representative Employee (or Employees) Who Worked in a Job Similar to the Discriminatee's Before the Unfair Labor Practice and During the Backpay Period [footnote omitted].''

[7] Marc Yeaney is included in both earlier and later quarters of the specification without objection by Respondent.

[8] This fact is clear in the underlying unfair labor practice decision, *International Trailer Co.*, 133 NLRB 1527 (1961). Indeed some of the discriminatees were group leaders at the time of their discharge.

[9] In making these findings the Board notes that ambiguity should be resolved against the wrongdoer. See, e.g., *Bailey Distributors*, 292 NLRB 1106 at 1106 (1989).

neaux, Harris, and Ballinger were each asked in 1988 to accept a supervisory position, but that each declined. Respondent argues the refusals showed that the discriminatees would not accept such an offer then and therefore it should be assumed that they would not have accepted such an offer thereafter. The General Counsel argues the offers of a supervisory position showed Respondent thought the individuals qualified for the post and that such positions would have been offered again and likely accepted.

Each of the arguments set forth above is relevant and has been considered in reaching my decision here. I find based on the record as a whole that as to this issue the probabilities favor the General Counsel. The discriminatees were senior and were regarded as qualified by Respondent. One of the three who had earlier refused such a position might well have changed his mind. Another of the discriminatees might have been offered the position and accepted. I find it is improbable that all the discriminatees would refuse the promotion at issue here which included an increase in compensation. On balance I find that it is reasonable to conclude that one of the discriminatees would have received the position even if such a finding is not possible as to any particular discriminatee.

I have found that the one of the discriminatees would likely have received the promotion. Given the averaging formulation of comparable employees reflected in the specification's gross backpay calculation, the higher wages of the supervisory position are spread among the discriminatees. While the cost to Respondent is the same as if a specific discriminatee were assumed to have received the promotion, in the specification all discriminatees in the relevant quarters receive an aliquot portion of the higher sales manager rate. This averaging effect is the same as that which occurs respecting wages generally under the comparable employees' averaging formula long used by the Board with court approval. I see no reason to find it inappropriate on the facts of this case. Accordingly, I find the inclusion of Yeaney in the specification appropriate.

B. *The Inclusion of J. Sasser*

The General Counsel included Respondent's employee J. Sasser as a comparable employee in the fourth quarter of 1992 and the first and second quarters of 1993. Respondent argues that for the period of his inclusion in the specification, Sasser was an employee of an acquired operation and that Respondent retained the former employees of the acquired enterprise, including Sasser, in their old positions so that they continued to operate their former routes. Respondent argues that Sasser's route was never available to Respondent's longstanding route drivers who were comparable to the discriminatees and therefore Sasser should not be considered a comparable employee.

The General Counsel makes two arguments. First the General Counsel argues that Respondent's contention respecting Sasser was first raised by Respondent at the trial on March 7, 1995, and should therefore be disallowed as untimely. Second, the General Counsel argues that as part of Respondent's expanded business, Sasser's position was properly included.

Addressing the General Counsel's initial argument, Respondent in its answer alleged generally that the General Counsel had improperly included certain individuals as comparable employees in calculating gross backpay for certain calendar quarters. Both in earlier pleadings and in Respondent's Appendix ''C'' of its answer to the second amended compliance specification in the portion addressing the fourth quarter 1992 and the first and second quarters 1993, Respondent alleged that Sasser should be excluded and Logan included in calculating average employee comparable earnings. Thus, the General Counsel was on notice through the pleadings that an issue as to Sasser's inclusion as a comparable employee existed.

Kelley's testimony was undisputed that during the three calendar quarters at issue Sasser worked on routes that would not have been available to the discriminatees even if they had they not been discriminated against. I find this unmet factual proposition is sufficient to disqualify Sasser. Given the stipulations of the parties respecting the arithmetic accuracy of the alternative calculations contained in the amended specification and answer, it is appropriate to substitute Logan's wages for Sasser's in the average comparable employee formulation as appears on Respondent's Exhibit 1 for the fourth quarter of 1992 and the first two quarters of 1993.

VI. THE EFFECT OF DELAY ON THE OBLIGATIONS OF RESPONDENT

There is no question on this record that a very substantial period of time passed between the Board's adoption of Judge Nelson's Decision and Order in the absence of exceptions and the Board's Regional Office's formal communication to Respondent that it considered the letters at issue here to be inadequate. Respondent argues on brief at 13:

> Unitog acknowledges that the law is well settled that, however egregious and prejudicial, delay in compliance matters by the agency alone will not toll the accumulation of backpay to discriminatees—under the principle that such discriminatees should not be themselves prejudiced by the acts or omissions of government. In the instant case, however, the disciminatees (except Johnson and Massie) are participants as well in the injustice visited upon the Company. Presented with correspondence expressly offering ''unconditional employment'' with wages, benefits and seniority commensurate with that which was ultimately ordered by Judge Nelson, they did nothing. Such willful inaction—and their conduct cannot be described otherwise, unless their non-response represented their refusal of reemployment—is wholly inconsistent with their duty to mitigate their damages. Under this confluence of circumstances, created and exacerbated in equal measure by both the Region and the discriminatees, it is entirely appropriate for Unitog's backpay obligation to be tolled during the two years in question.

The General Counsel, as noted in the section of this decision entitled: ''The Effect of Respondent's Letters of March 1990 and September 1991,'' in June 1990 expressed the opinion in the presence of former counsel to Respondent that the March 1990 letters were inadequate as offers of reinstatement. Based on this fact, counsel for the General Counsel argues that it was not the Government or the employees who are to blame for Respondent's failure to correct its inadequate offer until substantial time had passed and its finan-

cial obligations increased. As to Respondent's claim that the employees were part of the cause of prejudice to Respondent, the General Counsel asserts that under clear Board case law discriminatees are obligated to answer valid offers of reinstatement or face a tolling of backpay, but are under no obligation in law to respond to inadequate offers.

Further the General Counsel on brief notes at 2–3:

> Delay is never to be condoned, however as the Supreme Court observed, employees are not to be penalized because there has been delay. See *N.L.R.B. v. J. H. Rutter-Rex Manufacturing Company*, 395 U.S. 258, 264–265 (1969). [Secondary citation omitted.] Significantly, the circuit in which our case lies was reversed on the very point that Respondent is trying to urge herein. Respondent seeks, because it views there was inordinate delay in processing this backpay matter, that it is entitled to a tolling of the period in some fashion. This is precisely the argument that the Fifth Circuit bought in *Rutter-Rex*. That is precisely the area upon which the Supreme Court reversed the Fifth Circuit. Respondent is not entitled to any diminution of backpay because of its perception of delay.

Having considered the arguments of the parties in light of existing case law and the record as a whole, I find there is no reason to reduce Respondent's obligations as a result of discriminatees' failure to respond to the letters. The issues respecting the employees' failure to respond to the letters are part and parcel of my earlier determination of whether or not the letters were valid unconditional offers of reinstatement. Were they sufficient, response would have been necessary or the discriminatees' rights to reinstatement and continuing backpay would have been tolled. I have found, supra, however that the letters were fatally defective and therefore did not trigger an obligation to respond. That determination and the policy questions which have informed Congress in the drafting of the Act and the Board and courts in interpreting and applying its provisions, includes consideration of the burdens and costs of ambiguity and delay. Simply put, there was no obligation on the part of the employees to respond and therefore no valid claim by Respondent may be asserted which seeks to reduce Respondent's obligation because the discriminatees failed to respond.

Turning to the Government's delay, I make no findings respecting governmental delay because I find the General Counsel's cited case, *NLRB v. J. H. Rutter-Rex Mfg. Co*., 395 U.S. 258, 264–265 (1969), is dispositive. Governmental delay of the type at issue here is not a factor to be considered in compliance proceedings. Having decided that neither the discriminatees' failure to respond to Respondent's letters nor governmental delay in processing the instant case in the compliance stage is a valid basis from reducing Respondent's obligations, I further find that the two elements together, as Respondent argues in the portion of its brief quoted, supra, do not require reduction. Accordingly, I reject all Respondent's arguments respecting its request for reduction in obligations based on these grounds.

VII. SUMMARY AND CONCLUSIONS

In summary, the parties ultimately agreed on the great bulk of the allegations of the specification. Those agreements have been adopted and are set forth below.

Respecting the remaining areas of difference, I have rejected all challenges to the compliance specification save one. I have rejected Respondent's contentions that Smith be excluded from all remedies here as inconsistent with the controlling Order in the unfair labor practice portion of this case. I have rejected Respondent's argument that Yeaney should not be used as a comparable employee in the second, third, and fourth quarters of 1991 and the first quarter of 1992 because I found that it was reasonable to assume that one of the discriminatees would have received the promotion Yeaney received and that the increased wage rate that promotion entailed should be included in the average comparable employee remuneration for the relevant quarters. I have rejected Respondent's arguments that its letters to employees in March 1990 and September 1991 were valid and unconditional offers of reinstatement which tolled backpay finding them rather to be fatally conditional in nature. I have rejected Respondent's arguements that delay should reduce its obligations.

Finally, I have sustained Respondent's argument that Sasser was wrongfully included as a comparable employee in the fourth quarter of 1992, the first quarter of 1993, and the second quarter of 1993. I concluded that the Sasser objection was timely raised and that Respondent demonstrated that Sasser was not a comparable employee for purposes of backpay calculation in the named quarters. Relying on the stipulations of the parties respecting the arithmetical accuracy of the specification and answer calculations, I substituted Logan for Sasser as one of the comparable employees in the three quarters noted above as set forth in Respondent's amended answer.

The approved discriminatee backpay calculations, by calendar quarter, are set forth in the appendix and in summary form, without interest, below. The parties agreed the contract rate restoration portion of the judge's Order is fully applied by allotting employee Frances, no first name given, the sum of $487.98 accruing in the fourth quarter of 1989. All amounts set forth in this supplemental decision are to be paid with interest as required under the judge's Order.

On the basis of the foregoing, and pursuant to Section 10(c) of the Act, it is recommended that the Board issue the following[10]

ORDER

It is ordered that the Respondent, Unitog Rental Services, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall forthwith pay the following individuals the amounts set forth immediately below, and shall further pay Frances $487.98 accruing in the fourth quarter of 1989. The

[10] All motions inconsistent with this recommended Order not otherwise ruled on at the hearing or here are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

total amounts due and owing shall include interest, calculated in the manner and in the amount set forth in the original Order here, utilizing the quarterly accruals as set forth in the attached appendix and the date of accrual of Frances' amounts as set forth above.

Gilbert Babineaux	$2.91
James Ballinger	37,911.67
Frances	487.98
Freddie Harris	36,706.54
Charles Johnson	56,202.07
Sidney Marlin	29,230.66
Myron Massie	21.01
Clarence Smith	32,110.61
Total due without interest	$192,673.45

APPENDIX

DISCRIMINATEES BY QUARTERS

	Routemen	*Average*	*Discriminatees*	*Interim Earnings*	*Backpay*
4th Qtr. 1989					
Finster	$7,536.97	$6,299.95	Babineaux	$6,297.04	$2.91
Cullum	6,980.66	6,299.95	Harris	6,388.33	- 0 -
Yeaney M.	6,413.42	6,299.95	Marlin	7,579.01	- 0 -
Urmy	6,531.21	6,299.95	Ballinger	6,011.69	288.26
Schoenle	6,337.44	6,299.95	Massie	6,278.94	21.01
Charles	4,000.01	6,299.95	Johnson	4,400.51	1,899.44
Total	[6]$37,799.71				$2,211.62
Average	$6,299.95				
1st Qtr. 1990					
Cullum	$6,916.49	$5,210.79	Babineaux	$5,270.14	- 0 -
Finster	6,769.15	5,210.79	Harris	5,844.60	- 0 -
Urmy	6,613.27	5,210.79	Marlin	6,956.88	- 0 -
Yeaney M.	6,184.15	5,210.79	Ballinger	6,154.50	- 0 -
Charles	6,116.18	3,473.86	Massie	5,119.74	- 0 -
Markoski	1,984.01	5,210.79	Johnson	4,810.00	$400.79
Schoenle	1,892.00	5,210.79	Smith	5,308.61	- 0 -
Total	[7]$36,475.25				$400.79
Average	$5,210.79				
2d Qtr. 1990					
Cullum	$9,220.93	$7,939.03	Babineaux	$8,478.99	- 0 -
Peel J.	9,220.93	7,939.03	Harris	5,022.81	$2,916.22
Patterson	8,192.91	7,939.03	Marlin	6,314.55	1,624.48
Yeaney M.	7,175.43	7,939.03	Ballinger	6,154.50	1,784.53
Urmy	7,021.96	7,939.03	Johnson	4,810.00	3,129.03
Charles	6,802.03	7,939.03	Smith	5,305.78	2,633.25
Total	[6]$47,634.19				$1,2087.51
Average	$7,939.03				
3d Qtr. 1990					
Urmy	$7,792.86	$6,817.42	Babineaux	$9,083.16	- 0 -
Charles	7,144.61	6,817.42	Harris	5,137.63	$1,679.79
Markowski	7,074.71	6,817.42	Marlin	6,271.96	545.46
Yeaney M.	7,040.75	6,817.42	Ballinger	6,154.50	662.92
Peel J.	6,133.59	6,817.42	Johnson	4,810.00	2,007.42
Patterson K.	5,718.01	6,817.42	Smith	5,559.95	1,257.47
Total	[6]$40,904.53				$6,153.06
Average	$6,817.42				
4th Qtr. 1990					
Markoski	$8,676.39	$7,941.36	Babineaux	$9,083.16	- 0 -
Charles	7,536.39	7,941.36	Harris	6,088.39	$1,852.97
Urmy	8,105.31	7,941.36	Marlin	6,423.00	1,518.36
Yeaney M.	8,541.41	7,941.36	Ballinger	6,154.00	1,787.36
Peel J.	8,115.84	7,941.36	Johnson	4,992.00	2,949.36
Anderson B.	6,672.78	7,941.36	Smith	6,193.71	1,747.65
Total	[6]$47,648.11				$9,855.70
Average	$7,941.36				

APPENDIX—Continued

DISCRIMINATEES BY QUARTERS

	Routemen	*Average*	*Discriminatees*	*Interim Earnings*	*Backpay*
1st Qtr. 1991					
Yeaney M.	$8,512.11	$7,710.93	Babineaux	$9,562.02	- 0 -
Markowski	8,190.47	7,710.93	Harris	5,613.30	$2,097.63
Charles	7,828.57	7,710.93	Marlin	6,103.68	1,607.25
Yeaney B.	7,660.77	7,710.93	Ballinger	6,269.96	1,440.97
Peel J.	7,457.21	7,710.93	Johnson	4,968.00	2,742.93
Tanner J.	6,616.46	7,710.93	Smith	5,810.72	1,900.21
Total	[6]$46,265.59				$9,788.99
Average	$7,710.93				
2d Qtr. 1991					
Markowski	$9,121.78	$8,188.70	Babineaux	$9,562.02	- 0 -
Urmy	8,896.89	8,188.70	Harris	6,411.20	$1,777.50
Yeaney B.	8,253.79	8,188.70	Marlin	6,963.64	1,225.06
Peel J.	8,472.45	8,188.70	Ballinger	6,269.96	1,918.74
Keenan T.	7,548.27	8,188.70	Johnson	5,112.00	3,076.70
Yeaney M.	6,839.02	8,188.70	Smith	6,291.31	1,897.39
Total	[6]$49,132.20				$9,895.39
Average	$8,188.70				
3d Qtr. 1991					
Urmy	$8,890.65	$7,360.22	Babineaux	$9,562.02	- 0 -
Yeaney B.	8,657.19	7,360.22	Harris	6,749.46	$610.76
Anderson	7,923.73	7,360.22	Marlin	6,948.81	411.41
Yeaney M.	6,903.51	7,360.22	Ballinger	6,269.96	1,090.26
Kurtz T.	5,993.24	7,360.22	Johnson	5,053.05	2,307.17
Markowski	5,793.05	7,360.22	Smith	6,268.01	1,092.21
Total	[6]$44,161.37				$5,511.81
Average	$7,360.22				
4th Qtr. 1991					
Urmy	$10,604.35	$8,289.04	Babineaux	$9,562.02	- 0 -
Yeaney B.	10,071.28	8,289.04	Harris	7,295.96	$993.08
Morton J.	9,284.67	8,289.04	Marlin	7,349.19	939.85
Kurtz T.	8,029.95	8,289.04	Ballinger	6,269.96	2,019.03
Yeaney M.	7,476.16	8,289.04	Johnson	5,358.40	2,930.64
Abbas R.	4,267.75	8,289.04	Smith	7,949.89	339.15
Total	[6]$49,734.19				$7,221.75
Average	$8,289.04				
1st Qtr. 1992					
Yeaney B.	$10,499.12	$9,132.68	Babineaux	$12,384.14	- 0 -
Urmy	10,514.49	9,132.68	Harris	6,763.02	$2,369.66
Morton J.	9,796.64	9,132.68	Marlin	7,776.39	1,356.29
Markowski	8,636.33	9,132.68	Ballinger	6,617.50	2,515.18
Kurtz T.	7,803.17	9,132.68	Johnson	5,122.00	4,010.68
Yeaney M.	7,546.28	9,132.68	Smith	6,850.81	2,281.87
Total	[6]$54,796.03				$12,533.68
Average	$9,132.68				
2d Qtr. 1992					
Yeaney B.	$11,403.75	$9,654.31	Babineaux	$12,384.14	- 0 -
Urmy	10,374.82	9,654.31	Harris	6,962.58	$2,691.31
Morton J.	9,918.93	9,654.31	Marlin	7,067.99	2,586.32
Markowski	9,897.53	9,654.31	Ballinger	6,617.50	3,036.81
Yeaney M.	8,378.11	9,654.31	Johnson	5,004.00	4,650.31
Kurtz T.	7,952.69	9,654.31	Smith	7,282.50	2,371.81
Total	[6]$57,925.83				$15,336.56
Average	$9,654.31				

APPENDIX—Continued

DISCRIMINATEES BY QUARTERS

	Routemen	*Average*	*Discriminatees*	*Interim Earnings*	*Backpay*
3d Qtr. 1992					
Yeaney B.	$12,246.21	$10,092.60	Babineaux	$12,384.14	- 0 -
Marlowski	11,081.50	10,092.60	Harris	6,633.00	$3,459.60
Morton J.	110,43.21	10,092.60	Marlin	7,216.73	2,875.87
Urmy	10,625.21	10,092.60	Ballinger	6,617.50	3,475.10
Yeaney M.	10,494.49	10,092.60	Johnson	5,736.00	4,356.60
Abbas R.	5,064.98	10,092.60	Smith	7,036.09	3,056.51
Total	[6]$60,555.60				$17,223.68
Average	$10,092.60				
4th Qtr. 1992					
Nauls	$11,982.93	$10,751.37	Babineaux	$12,384.14	- 0 -
Urmy	12,014.51	10,751.37	Harris	6,590.09	$4,161.28
Yeaney M.	11,808.98	10,751.37	Marlin	6,713.68	4,037.69
Yeaney B.	11,770.84	10,751.37	Ballinger	6,617.50	4,133.87
Markowski	11,754.96	10,751.37	Johnson	5,252.00	5,499.37
Logan, M	5,175.98	10,751.37	Smith	7,473.27	3,278.81
Total	[6]$64,508.20				$21,111.02
Average	$10,7851.37				
1st Qtr. 1993					
Nauls	$10,179.52	$8,694.94	Babineaux	$12,392.47	- 0 -
Markowski	9,893.23	8,694.94	Harris	6,270.00	$2,424.94
Urmy	9,529.87	8,694.94	Marlin	6,103.12	2,591.82
Yeaney B.	9,376.73	8,694.94	Ballinger	5,924.81	2,770.13
Yeaney M.	9,107.26	8,694.94	Johnson	5,342.90	3,352.04
Logan, M.	4,083.05	8,694.94	Smith	7,204.96	1,489.98
Total	[6]$52,169.66				$12,628.91
Average	$8,694.94				
2d Qtr. 1993					
Nauls	$11,441.42	$9,826.87	Babineaux	$12,392.47	- 0 -
Yeaney B.	11,098.65	9,826.87	Harris	6,594.00	$3,232.87
Markowski	10,865.71	9,826.87	Marlin	7,181.00	2,645.87
Yeaney M.	10,692.24	9,826.87	Ballinger	6,170.29	3,656.58
Urmy	10,476.91	9,826.87	Johnson	5,497.43	4,329.44
Logan, M.	4,386.31	9,826.87	Smith	6,896.50	2,930.37
Total	[6]$58,961.87				$16,795.13
Average	$9,826.87				
3d Qtr. 1993					
Guerra	$11,010.56	$9,486.61	Babineaux	$12,392.47	- 0 -
Yeaney M.	10,743.51	9,486.61	Harris	6,594.00	$2,892.61
Markoski	10,742.06	9,486.61	Marlin	7,181.00	2,305.61
Urmy	10,479.74	9,486.61	Ballinger	6,170.00	3,361.61
Yeaney B.	10,160.91	9,486.61	Johnson	5,534.00	3,952.61
Nelm	3,783.11	9,486.61	Smith	6,896.50	2,590.11
Total	[6]$56,919.89				$15,102.55
Average	$9,486.61				
4th Qtr. 1993					
Guerra	$12,579.22	$10,140.32	Babineaux	$12,392.47	- 0 -
Yeaney M.	12,571.27	10,140.32	Harris	6,594.00	$3,546.32
Yeaney B.	11,494.28	10,140.32	Marlin	7,181.00	2,959.32
Gardner	9,747.11	10,140.32	Ballinger	6,170.00	3,970.32
Nauls	7,941.75	10,140.32	Johnson	5,532.00	4,607.54
Nelms	6,508.32	10,140.32	Smith	6,896.50	3,243.82
Total	[6]$60,841.95				$18,327.32
Average	$10,140.32				

[6] See fn. 6 in judge's decision, supra.
[7] See fn. 7 in judge's decision, supra.

SUMMARY

TOTALS WITHOUT INTEREST

Names	*Babineaux*	*Frances*	*Harris*	*Marlin*	*Ballinger*	*Messie*	*Johnson*	*Smith*
4th Qtr. 1989	$2.91	$487.98	- 0 -	- 0 -	$288.26	$21.01	$1,899.44	- 0 -
1st Qtr. 1990	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	400.79	- 0 -
2d Qtr. 1990	- 0 -	- 0 -	$2,916.22	$1,624.48	1,784.53	- 0 -	3,129.03	$2,633.25
3d Qtr. 1990	- 0 -	- 0 -	1,679.79	545.46	662.92	- 0 -	2,007.42	1,257.47
4th Qtr. 1990	- 0 -	- 0 -	1,852.97	1,518.36	1,787.36	- 0 -	2,949.36	1,747.65
1st Qtr. 1991	- 0 -	- 0 -	2,097.63	1,607.25	1,440.97	- 0 -	2,742.93	1,900.21
2d Qtr. 1991	- 0 -	- 0 -	1,777.50	1,225.06	1,918.74	- 0 -	3,076.70	1,897.39
3d Qtr. 1991	- 0 -	- 0 -	610.76	411.41	1,090.26	- 0 -	2,307.17	1,092.21
4th Qtr. 1991	- 0 -	- 0 -	993.08	939.85	2,019.03	- 0 -	2,930.64	339.15
1st Qtr. 1992	- 0 -	- 0 -	2,369.66	1,356.29	2,515.18	- 0 -	4,010.68	2,281.87
2d Qtr. 1992	- 0 -	- 0 -	2,691.31	2,586.32	3,036.81	- 0 -	4,650.31	2,371.81
3d Qtr. 1992	- 0 -	- 0 -	3,459.60	2,875.87	3,475.10	- 0 -	4,356.60	3,056.51
4th Qtr. 1992	- 0 -	- 0 -	4,161.28	4,037.69	4,133.87	- 0 -	5,499.37	3,278.81
1st Qtr. 1993	- 0 -	- 0 -	2,424.94	2,591.82	2,770.13	- 0 -	3,352.04	1,489.98
2d Qtr. 1993	- 0 -	- 0 -	3,232.87	2,645.87	3,656.58	- 0 -	4,329.44	2,930.37
3d Qtr. 1993	- 0 -	- 0 -	2,892.61	2,305.61	3,361.61	- 0 -	3,952.61	2,590.11
4th Qtr. 1993	- 0 -	- 0 -	3,546.32	2,959.32	3,970.32	- 0 -	4,607.54	3,243.82
TOTALS	$2.91	$487.98	$36,706.54	$29,230.66	$37,911.67	$21.01	$56,202.07	$32,110.61

TOTAL AMOUNT DUE WITHOUT INTEREST $192,673.45